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VIA ELECTRONIC FILING (ECFS)

Marlene H. Dortch, Esq., Secretary  
Federal Communications Commission  
445 Twelfth Street, SW  
Washington, DC 20554

RE: **WRITTEN EX PARTE PRESENTATION**  
Telecommunications Relay Services and Speech-to-Speech Services for  
Individuals with Hearing and Speech Disabilities  
CG Docket No. 03-123

Dear Ms. Dortch:

Hamilton Relay, Inc., by its counsel and pursuant to Section 1.1206(b)(1) of the Commission's rules, 47 C.F.R. § 1.1206(b)(1), hereby submits these written comments for inclusion in the public record for the above-captioned proceeding. Like many other relay providers and consumers, Hamilton is concerned about the continued blocking of Video Relay Service ("VRS") calls by several VRS providers. For the reasons set forth below, Hamilton urges the Commission to require the elimination of all call blocking practices. This step can be taken without endangering future engineering, research and development ("R&D") if the Commission follows one of the approaches outlined below.

**I. The Commission Must Act Quickly to Stop VRS Call Blocking**

Numerous VRS consumers and providers have made it clear to the Commission that VRS call blocking is a serious problem that is growing and must cease. Simply put, the continuing practice of call blocking is denying relay users the functional equivalence mandated by the ADA. The problem is only increasing because more providers have begun blocking VRS calls. It is clear at this point that the industry cannot resolve this problem and that a regulatory solution is needed. Hamilton joins with others in urging the Commission to adopt a strict policy prohibiting all forms of relay call blocking.

Such a policy would be fully consistent with the Commission's recent determination that it "has jurisdiction necessary to ensure that . . . IP-enabled services are operated in a neutral manner" and that broadband networks are "open" and "accessible" to "*all* consumers."<sup>1</sup> Under this "network neutrality" policy, consumers are entitled to "access the lawful Internet content of their choice" and to "run applications and use services of their choice."<sup>2</sup> Clearly, the call blocking practices of certain VRS providers are inconsistent with this network neutrality policy. The Commission has a duty to incorporate these policies into its relay rules by prohibiting call blocking.

## **II. Require Call Blockers to Notify Consumers of the Interoperability Effective Date**

Many consumers are by now resigned to the fact that they cannot make certain relay calls with the free equipment given away by certain providers. Because of this problem, a "consumer education" effort should be required to ensure that relay users are aware of the new interoperability policies. Hamilton suggests that the easiest method for ensuring consumer education would be to require all providers who have blocked calls in the past to notify their users that the call blocking restrictions have been lifted. Even though Hamilton has never blocked calls, it would be willing to assist in the consumer education effort by notifying consumers of the interoperability standards on the Hamilton website.

## **III. Innovation Would Not Be Compromised if the Commission Prohibits Call Blocking by Mandating Interoperability**

Hamilton believes that the Commission may prohibit call blocking while ensuring that innovation is not compromised. Several approaches are available to the Commission to ensure that providers' legitimate research and development and other costs related to innovation are recouped. At the outset, however, Hamilton wishes to underscore the point that swift Commission action to prohibit call blocking is of paramount importance to the relay community.

### **A. Authorize Compensation for All R&D Costs**

Under current rules, relay providers must provide the TRS Fund administrator with "total TRS minutes of use, total interstate TRS minutes of use, total TRS operating expenses and total TRS investment," as well as "other historical or projected information reasonably requested by the administrator for purposes of

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<sup>1</sup> *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket Nos. 02-33, 01-377, 95-20, 98-10, GN Docket No. 00-185, CS Docket No. 02-52, *Policy Statement* at 2 (rel. Sept. 23, 2005) (emphasis added).

<sup>2</sup> *Id.*

computing payments and revenue requirements.”<sup>3</sup> The data submitted by providers must be in general accordance with the cost accounting rules set forth in Part 32 of the Commission's rules.<sup>4</sup> In 2004, the Commission upheld the Bureau's decision to disallow all R&D costs:

We find that the Bureau was correct in disallowing engineering expenses directed at research and development, including software development, relating to VRS enhancements that go beyond the applicable TRS mandatory minimum standards. There are limits - inherent in the Title IV scheme - to a provider's costs of developing and implementing TRS enhancements that are compensable from the Interstate TRS Fund. Title IV is intended to ensure that entities that offer telephone voice transmission services also offer TRS so that persons with certain disabilities have access to the functionality of a voice telephone call. That functionality is defined by the applicable mandatory minimum standards, so that when a provider offers eligible services that meet these standards it may recover its costs of doing so from the Interstate TRS Fund. Although these standards have not been static, and will continue to change as technology develops and the forms and types of TRS change, there are not gradations of functional equivalency. For a particular provider, the requirement of functional equivalency is met when the service complies with the mandatory minimum standards applicable to the specific service. In this way, the Interstate TRS Fund does not become an unbounded source of funding for enhancements that go beyond these standards, but which a particular provider nevertheless wishes to adopt. This is particularly important because the funding for such enhancements would have to come from our adoption of a higher carrier contribution factor applicable to providers of all interstate telecommunications services - costs ultimately passed on to all consumers. . . . [T]he Interstate TRS Fund was intended to be a source of funding for the development of TRS services, features, and enhancements that, although perhaps desirable, are not necessary for the provision of functionally equivalent TRS service as an accommodation for persons with certain disabilities. Indeed, such a result would be especially problematic with respect to the provision of forms of TRS - such as VRS - that we have permitted but have not mandated.<sup>5</sup>

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<sup>3</sup> 47 C.F.R. §64.604(c)(5)(iii)(C).

<sup>4</sup> *Id.*

<sup>5</sup> *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, Report and Order, Order on Reconsideration and Further Notice of Proposed Rulemaking*, CC Docket Nos. 90-571, 98-67, CG Docket No. 03-123, 19 FCC Rcd 12475, ¶ 189 (2004) (footnotes omitted).

Nonetheless, the Commission went on to say:

We also restored some costs that related to engineering support. Although, as noted above, engineering costs that are incurred at the election of a provider in order to exceed the mandatory minimum standards, or that lead to the development of proprietary products, are not permitted, we find that some recurring costs are necessary to ensure that VRS assets are properly maintained and to allow providers to meet the minimum technical standards that we prescribe.<sup>6</sup>

The decision to deny certain engineering costs but permit others is the subject of a pending Petition for Reconsideration.<sup>7</sup> One possible solution is to adopt a policy mandating interoperability (and thus prohibiting call blocking) but grant the Petition for Reconsideration to the extent that legitimate R&D costs are included in the rate methodology. Hamilton agrees with Hands On that it is appropriate to include R&D costs in the rate methodology when it is clear that those costs stand to benefit VRS consumers.<sup>8</sup> Moreover, the inclusion of R&D costs is consistent with the Commission's statutory mandate to ensure that its regulations "do not discourage or impair the development of improved technology."<sup>9</sup>

While this is one possible approach, Hamilton is concerned that issuing formal decisions on the Petitions for Reconsideration will only further delay Commission action on call blocking, which is crippling the VRS community. An alternative approach would be to prohibit call blocking now, and require providers to submit their R&D costs with their December 31 cost submissions, or even with their April 15 annual reports, as described below.

## **B. Require Providers to Disclose Proposed R&D Costs Annually**

VRS providers are required to submit cost data at the end of each year to the Interstate TRS Fund Administrator. VRS providers are also required to file progress reports every April 15. Hamilton suggests that the Commission could obtain R&D cost information from VRS providers through one of these reporting mechanisms.<sup>10</sup> The April 15 approach may be preferable because any Paperwork

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<sup>6</sup> *Id.* ¶ 192 (footnote omitted).

<sup>7</sup> Hands On Petition for Partial Reconsideration, CC Docket No. 98-67 (filed Oct. 1, 2004).

<sup>8</sup> *Id.* at 18-19.

<sup>9</sup> 47 U.S.C. § 225(d)(2); Hands On Petition at 19.

<sup>10</sup> R&D costs could be filed by providers on a confidential basis, as with other cost data submitted.

Reduction Act obligations could easily be satisfied prior to April 15, leaving the Commission free to act now to prohibit all VRS call blocking.

This approach would permit the Commission to take into account the fact that TRS standards "have not been static, and will continue to change as technology develops and the forms and types of TRS change." In addition, under this approach providers' engineering cost data could be analyzed annually by the Fund Administrator and Commission staff, to ensure that only R&D costs that are directly related to the improvement of VRS technology or "are necessary to ensure that VRS assets are properly maintained and to allow providers to meet the minimum technical standards" are included in the rate base.<sup>11</sup> The Commission could even require VRS providers to certify that the R&D costs included in their submission are limited to R&D costs directly related to the provisioning or improvement of VRS.

Furthermore, as Hands On notes in its Petition for Reconsideration,<sup>12</sup> the Commission may not have adequately elicited the minimum standards for VRS, and therefore it may be difficult to determine which R&D costs are legitimately related to compliance with minimum relay standards and which are not. Hands On suggests that a "rule of reasonableness" might be the better approach. "[T]he proper standard for judging these expenses for which there is no minimum standard, and the one that the Commission should adopt on reconsideration, is one of reasonableness, having proper regard for the cost to be incurred versus the benefit to be achieved." Hamilton agrees, and believes that providers may set forth their justifications for R&D costs each year in their annual cost data submissions or their April 15 VRS reports. The Commission may then use its agency expertise to determine which costs are reasonable.

### **C. Consider Alternatives to Rate of Return Regulation**

Importantly, Hamilton continues to believe that the "rate of return" methodology which arises from Part 32 accounting is not a viable long-term methodology for VRS or any other form of relay. Hamilton has encouraged the Commission to seek public comment on the Hamilton "MARS Plan" and Hamilton does so again here.<sup>13</sup> VRS has been and continues to be a competitive market; rate of return regulations designed to curb monopolistic practices have no bearing on VRS. There are other methodologies available for compensating providers for the reasonable costs of providing relay without scrutinizing individual providers' cost data. Hamilton encourages the Commission to examine these alternatives, but not

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<sup>11</sup> *Id.* ¶¶ 189, 192.

<sup>12</sup> Hands On Petition for Partial Reconsideration, at 16.

<sup>13</sup> See Hamilton Petition for Reconsideration, CC Docket No. 98-67 (filed Oct. 1, 2004).

at the expense of the call blocking issue. To the extent that call blocking is inherently tied to the issue of R&D costs, Hamilton urges the Commission to adopt an interim method of reviewing R&D costs through one of the other methods discussed above.

#### **IV. Summary**

The California Coalition Petition has garnered universal support from relay providers and consumers, with the exception of the providers who practice call blocking. It is becoming clear that competition in the VRS market will be stifled, perhaps permanently, if the Commission does not act soon to mandate interoperability among providers. Hamilton encourages the Commission to move quickly on this issue, and to address R&D cost recovery through one of the methods suggested above. Relay consumers need to be informed of any Commission decision regarding interoperability. To this end, Hamilton encourages the Commission to require VRS call blockers to notify consumers that calls will no longer be blocked after the effective date of the Commission's interoperability rules.

In the event that there are any questions concerning this matter, please contact the undersigned.

Respectfully submitted,

HOLLAND & KNIGHT LLP

/s/ David A. O'Connor

David A. O'Connor

Counsel for Hamilton Relay, Inc.

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